UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

ALLIEDBARTON SECURITY SERVICES
Employer

- and - **Case No. 2-RD-1565**

MOTASHEM ZILLAH, an Individual,
Petitioner

-and-

ALLIED INTERNATIONAL UNION
Intervenor

DECISION AND ORDER DISMISSING PETITION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter[1] and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated and I find that AlliedBarton Security Services, LLC, herein the Employer, a Delaware limited liability company with its principal office located in King of Prussia, PA, and additional places of business located in Manhattan and Brooklyn, NY, is engaged in the business of providing security services to customers throughout the country,

[1] The briefs submitted by the parties have been duly considered.

including the New York City Department of Citywide Administrative Services. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of $50,000, for services performed for the City of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Allied International Union, herein the Union, is a labor organization within the meaning of section 2(5) of the Act.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c) (1) and 2(6) and (7) of the Act.

5. At the commencement of the hearing, the petition filed by Motashem Zillah, an individual, herein called Petitioner, was amended to seek all full-time and part-time unarmed security guards employed by the Employer at New York City government locations pursuant to a contract with the New York City Department of Citywide Administrative Services, contract number 2787356; and excluding, all armed security guards, non-guards, managers, clerical employees, professional employees and supervisors as defined in the Act.

As evidenced at the hearing and the briefs, the parties disagree on how to calculate when a 120-day insulated period for bargaining began to run pursuant to an informal settlement agreement entered into among the Employer and the two unions seeking to represent the unit employees. The Allied International Union, herein the incumbent Union, argues that the petition should be dismissed as untimely filed because the 120-day insulated period began with the first face-to-face bargaining session it had with the Employer which took place on February 27, 2008. Accordingly, it contends that the instant petition filed on June 5, 2008, is within the insulated period which extends to June 27, 2008. To the contrary, Petitioner contends that an election should be conducted because the insulation period began to run as early as January 9,

2008, the date on which the Regional Director approved the above-referenced settlement agreement. Alternatively, Petitioner argues that on February 1, 2008, when the Region notified the Union that the Employer had submitted an affidavit of compliance and indicated a willingness to bargain, the insulation period had begun to run. Finally, Petitioner contends that the Union's formal demand for bargaining letter dated February 4, 2008, is the latest date on which the insulation period should begin. In support of its argument that the insulation period pre-dates the first actual bargaining session, Petitioner claims that bargaining commences with exploratory conversations which are part of the relationship building embedded in the collective bargaining process.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, I am dismissing the petition as untimely filed. To provide a context for my discussion, I will review the background facts. Then, I will present the facts and reasoning that supports my conclusions on this issue.

I. Facts

The Incumbent Union and a company called Tri-Star Patrols, Inc., had a collective-bargaining agreement which was effective by its terms from September 1, 2005, to August 31, 2008. In December 2006, the Employer was awarded the applicable City contract covering this unit. Shortly after the transfer, the Incumbent Union filed a charge against the Employer alleging that it had failed and refused to bargain in good faith in violation of Section 8(a)(5), by, inter alia, granting recognition to local 32BJ, SEIU, herein Local 32BJ.

On January 9, 2008,[2] the Regional Director approved an informal settlement of the above-mentioned charge which was entered into by the Employer and the two unions and

[2] All dates forthwith are 2008.

provided, in relevant part, that the Incumbent Union's status as the exclusive bargaining agent for the bargaining unit "shall be insulated from any challenges for a period of 120 days following the commencement of good faith bargaining."

On January 30, the Employer submitted an affidavit of compliance affirming: that it would recognize and bargain with the Incumbent Union; that it had withdrawn all recognition from Local 32BJ; and, that it posted the official Notice to Employees at the required facilities.

Also on January 30, respective counsel for the Incumbent Union and the Employer, Dennis Devaney[3] and Peter Conrad, spoke via telephone regarding the background facts leading to the above-referenced unfair labor practice case. They also discussed, among other things, the Employer's compliance with the settlement agreement.

Sometime in late January, Conrad informed Devaney that the Employer's director of labor relations, David Chapla, was the contact person for scheduling dates regarding collective bargaining.

By letter dated February 4, the Incumbent Union formally demanded bargaining. The Union made an information request for the current contact information of all the unit employees. Regarding the logistics, Devaney suggested alternating locations for the bargaining sessions between the Union offices and the Employer's attorney's offices, and enclosed a list of nine proposed bargaining dates beginning February 26 through March 27, with a notation that depending on the pace of the parties' progress, they can set additional dates that were mutually convenient.

On February 7, by telephone, Chapla informed Devaney that the Employer's lead negotiator was Marty Martenson, Esq. and that Chapla would confirm dates after consultation

[3] Mr. Devaney was newly retained by the Incumbent Union and had not been involved in the negotiation of the informal settlement agreement.

with his negotiating team. On February 11, via e-mail, Chapla informed Devaney that he would quickly finalize dates.

On February 18, Martenson called Devaney and they selected February 27 as the first bargaining session. No further testimony was adduced regarding the content of this conversation. The record demonstrates that no substantive bargaining with Conrad, Chapla or Martenson, on economic and non-economic issues, occurred prior to the February 27 bargaining session.

From February 27 to June 20, the Union and the Employer conducted between six to nine bargaining sessions. According to Devaney, the parties agreed to a collective-bargaining agreement on June 20.

II. Analysis

The issue presented is whether the "commencement of good faith bargaining" for the purpose of triggering the insulation period provided for in an informal settlement agreement, should be construed as, the date of the first bargaining session.

The facts outlined above are not in dispute. A settlement was reached after charges alleging a violation of Section 8(a)(1) and (5) of the Act were filed by the Incumbent Union. These charges flowed from the Employer's voluntary recognition of Local 32BJ notwithstanding the fact that the Employer, as a successor employer, was obligated to bargain with Allied International Union, the Incumbent Union. The remedy that was required pursuant to the informal settlement agreement included a commitment by the Employer to bargain in good faith for a reasonable time as the exclusive bargaining agent for the bargaining unit and that the Incumbent Union's majority status "shall be insulated from any challenges for a period of 120

days following the commencement of good faith bargaining." The sole issue here is when the bargaining commenced.

In the context of an initial collective-bargaining relationship where the employer's unfair labor practices were remedied with an enforced Board order, the Board, in *Van Dorn Plastic Machinery Co.,* 300 NLRB 278 (1990), considered this precise issue. In that case, the employer argued that the certification year commenced when it furnished previously requested information and expressed its willingness to bargain, citing *Colfor, Inc*., 282 NLRB 1173 (1987), enfd. per curiam 838 F.2d 164 (6th Cir. 1988). The Board rejected the employer's arguments noting that the union could, in effect, be penalized for requesting information prior to negotiations because it could result in less time for negotiations within the insulation period. More importantly, given the passage of time between the certification and the final adjudication of the employer's unfair labor practices, the union should be granted time to reestablish contacts with the unit employees to facilitate bargaining on their behalf. The Board also explicitly rejected the employer's argument that the certification year began when it expressed a willingness to bargain. Accordingly, the Board held that absent unwarranted delay or bad faith by the union, the certification year commenced on the date of the parties' first bargaining session, thereby, overruling *Colfor, Inc. See Van Dorn, supra* at 279.[4]

Here, the facts establish that the Employer's recognition of Local 32BJ, the subject of the unfair labor practice settlement agreement, resulted in a year long loss of representational status by the Incumbent Union in the representation of the unit employees. As in *Van Dorn*, supra, the Incumbent Union needed time to reestablish contacts with the unit in order to effectively represent their interests in the bargaining. I find based on the Board's holding in *Van*

[4] The Board relied upon its holding in *Dominguez Valley Hospital*, 287 NLRB 149 (1987), enf'd 907 F.2d 905 (9th Cir.)

Dorn, requires me to find that the insulation period should not be tied to events that precede the face-to-face negotiations, such as the correspondence between the parties' attorneys or a Regional Director's approval of a settlement agreement. In those situations the unit employees were not parties or necessarily aware of what transpired. Starting the insulated period at the commencement of face-to-face bargaining establishes a definitive and clear point in time for the commencement of the insulated period.

While I am aware that the Board would not hold the face-to-face meetings as the start of bargaining, where the union engaged in dilatory conduct, the record in the instant case does not demonstrate that the Union engaged in any tactics that delayed the commencement of the face-to-face bargaining sessions. To the contrary, the parties proceeded with appropriate diligence to effectuate the terms of the settlement agreement. On January 30, the Employer affirmatively complied with the settlement agreement by posting the official notices and withdrawing recognition from Local 32BJ. On the same day, Union counsel Devaney spoke to Employer counsel Conrad and requested updated contact information for all of the unit employees. As a follow up, on February 4, the Union again made a written information request and proposed bargaining dates and locations. Both sides consulted with their respective bargaining teams and, within weeks, the first face-to-face meeting was conducted on February 27.

More recently, the Board, in *Lee Lumber*, 334 NLRB 399 (2001), established that where an employer refuses to bargain in good faith with an incumbent union, the affirmative bargaining remedy will include an insulation period to protect an incumbent union's status from being challenged in an atmosphere of unremedied unfair labor practices.[5] In an effort to reduce litigation, the Board defined a "reasonable time" as being not less than six months, but no more

[5] Petitioner misreads *MV Transportation*, 337 NLRB 770 (2002), where the Board overruled *St. Elizabeth Manor* and rejected the "successor bar" doctrine, holding instead that petitions will be processed absent unfair labor practices.

than one year. By applying a multi-factor test for determining whether more than six months constitutes a "reasonable time," the Board's analysis turned on the degree of progress made at the negotiations.

Notably, the Board explicitly stated that the standard announced in *Lee Lumber* applied only to situations in which the employer's unlawful refusal to bargain and recognize an incumbent union was adjudicated and left open a situation, like the instant case, where the parties entered into a settlement agreement requiring bargaining. In that regard, the Board has long-held that an employer's agreement to bargain is the quid pro quo for the union's agreement to drop its refusal to bargain charge. Accordingly, a settlement agreement can also obligate an employer to bargain for a reasonable period of time without questioning the union's majority status.[6] *Poole Foundry and Machine Co*., 95 NLRB 34 (1951), enforced, 192 F.2d 740 (4th Cir. 1951).

The fundamental principle in *Lee Lumber* is that withdrawal of recognition from an incumbent union causes lasting damage to the parties' bargaining relationship. The insulation period is an attempt to restore that "broken" relationship and provide the union with enough time to prove its mettle in negotiations so that employees may exercise their free choice without the taint of the employer's prior unlawful conduct. In this respect, *Lee Lumber* is merely an extension of the certification year rule which is grounded in § 9(c)(3) of the Act. *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962). Accordingly, the application of *Van Dorn* to the *Lee Lumber* and *Poole* lines of cases creates a consistent standard for determining when the insulation period begins to run, irrespective of whether the remedial action involves an initial

[6] In the instant case, had the alleged unfair labor practice concerning an employer's failure to bargain been adjudicated, the Board's remedy would have included a six-month insulation period pursuant to *Lee Lumber*. That the parties negotiated a period less than six months in order to settle the case is not inconsistent with the rationale underlying the "reasonable time" standard articulated by the Board in *Lee Lumber*.

contract or an incumbent union, or whether the remedy is an enforced Board order or pursuant to a settlement agreement.[7] Here, applying the rationale of the above cases, I find that the negotiated 120-day insulation period began to run on February 27, when the parties conducted their first negotiation session.

I am unpersuaded by Petitioner's arguments to the contrary. Regarding Petitioner's claim that the insulation period should run from the Employer's willingness to bargain which it expressed throughout January, it's reliance on *Transmarine* is misplaced. In all of the insulation period cases, the Board is attempting to balance the competing interests between protecting employee freedom of choice and maintaining stability of bargaining relationships. These considerations are not relevant for the imposition of a *Transmarine* remedy, the mechanics of which Petitioner urges here. The Board, in *Emsing's Supermarket, Inc*., 307 NLRB 421 (1992), held that the union's response to the employer's proposal of dates was the "commencement of bargaining" because the purpose of *Transmarine* is to induce a prompt dialogue between the parties. In cases concerning effects bargaining, the Employer's operations are usually in the process of dissolution and the relationship between the parties is nearing its final denouement. Conversely, the emphasis in *Van Dorn* and *Lee Lumber* is to protect the integrity of the collective-bargaining relationship by insulating the parties while they rebuild an ongoing bargaining obligation. The Board noted that its conclusion in *Emsing's* is not inconsistent with its holding in *Van Dorn* and explained that the divergent policy goals required a different measure for deciding when collective-bargaining commenced. *Emsing's Supermarket, Inc., id. at f.4*

Finally, Petitioner's reliance on cases where the parties engaged in telephonic negotiations are inapposite because none of them address an insulation period of any variety,

[7] *Swift Independent Packing Company*, 315 NLRB 774 (1994), merely stands for the proposition that the claimable relief is governed by the settlement agreement. Here, the Union obtained a 120-day insulation period instead of six months.

as set forth above. Rather, these cases examine an employer's bad faith bargaining by analyzing the proposals and positions of the parties throughout the negotiations. *APT Medical Transportation, Inc*., 333 NLRB 760 (2001)(bad-faith surface bargaining); *Grosvenor Orlando Associates, Ltd.,* 336 NLRB 613 (2001)(premature impasse); *International Protective Services, Inc.*, 339 NLRB 701 (2003)(strike not protected because union failed to take reasonable precautions to protect the employer's operations; negotiations were entirely telephonic where the unit was located in Alaska, the employer in California and the union in Washington). Similarly, whether the mechanics of bargaining are mandatory subjects giving rise to a Section 8(a)(5) violation, is irrelevant to the issue presented in the instant case. *The House of the Good Samaritan*, 319 NLRB 392 (1995)(failure to set dates is a ulp). Finally, rules governing the timeliness of an employer's withdrawal from multi-employer bargaining are inapposite because the policy consideration in those cases is to provide the union with notice regarding the composition of the employer association prior to face-to-face negotiations. *Patterson-Stevens, Inc.,* 316 NLRB 1278 (1995).

For all of the foregoing reasons, I have concluded that the 120-day insulation period commenced on February 27 and ran through to June 27. As the petition was filed during the insulation period, I am dismissing this petition as untimely filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **August 1, 2008**.

Dated: July 18, 2008
at New York, New York

/s/_____
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
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